Office-Supreme Court, U.S.
FILED
JUN 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-419

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF ARIZONA,

Petitioner,

against

MARICOPA COUNTY MEDICAL SOCIETY,
MARICOPA FOUNDATION FOR MEDICAL CARE, and
PIMA FOUNDATION FOR MEDICAL CARE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL RETIRED TEACHERS ASSOCIATION IN SUPPORT OF THE PETITIONER

MILLER, SINGER, MICHAELSON & RAIVES
555 Madison Avenue
New York, New York 10022
(212) 752-8830
Attorneys for Amici Curiae

ALFRED MILLER,
Counsel of Record.

PETER N. GREENWALD
STEVEN ZALEZNICK,
Of Counsel.

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Brief *Amici Curiae*

Question Presented 1

Statement of Interest of *Amici Curiae* 1

Argument 4

I. The Ninth Circuit's Creation of a Special Antitrust Exemption for Horizontal Price Fixing Among Physicians Threatens to Destroy any Chance of Health Care Cost Containment 5

II. Older Americans are Entitled to Purchase and Negotiate for Doctors' Services in an Open, Competitive Marketplace 6

Conclusion 8

Exhibit A: Consent of Petitioners to filing of Brief *Amici Curiae* 9

Exhibit B: Consent of Respondents to filing of Brief *Amici Curiae* 10

TABLE OF AUTHORITIES

PAGE

Cases:

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 6

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 6

United States v. *Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897) 6

United States v. *Trenton Potteries Co.*, 273 U.S. 392 (1927) 6

Statutes:

15 U.S.C. § 1 (1976) 1,3,4,6

42 U.S.C. § 300k-2(a)(17) (1979) 5,6

42 U.S.C. § 1395u (1977) 4

42 U.S.C. § 1395x (v)(1)(A) (1978) 4

Other Authorities:

127 CONG. REC. S3565 (1981) 3

Gibson, *National Health Expenditures 1979*, 2 HEALTH CARE FINANCING REVIEW 1 (Summer 1980) 2

Fisher, *Differences By Age Groups in Health Care Spending*, 1 HEALTH CARE FINANCING REVIEW 4 (Spring 1980) 2

No. 80-419

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF ARIZONA,

Petitioner,

against

MARICOPA COUNTY MEDICAL SOCIETY, MARICOPA FOUNDATION FOR MEDICAL CARE, and PIMA FOUNDATION FOR MEDICAL CARE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL RETIRED TEACHERS ASSOCIATION IN SUPPORT OF THE PETITIONER

QUESTION PRESENTED

Whether an agreement among competing physicians establishing fee schedules for their services is illegal *per se* under Section 1 of the Sherman Act.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) and the National Retired Teachers Association (NRTA),

of 1909 K Street, N.W., Washington, D.C. 20049, are affiliated and jointly administered not-for-profit membership corporations of more than 12,500,000 persons over the age of 55. This figure represents approximately one out of four people over the age of 55 nationwide, the largest organized group of older Americans in the country. Among the purposes of AARP and NRTA are: to enhance the quality of life for older persons; to promote independence, dignity and purpose for older persons; to lead in determining the role and place of older persons in society; and to sponsor research on physical, psychological, social, economic and other aspects of aging.

As retired persons, members of AARP and NRTA generally live on relatively fixed incomes and, because of their advanced age, many also depend on regular or frequent health care for their continued well being. Because of the need to limit the already high, and rapidly increasing, cost of health care, including physicians' fees, this case is especially critical to the health and welfare of AARP and NRTA members and of all older Americans.[1]

1. The elderly spend a far greater amount *per capita* on health care each year than younger persons. In 1979, the average annual health care expenditure for persons over 65 was $2,257 or 3½ times the average amount for citizens under 65. While older Americans comprise only 11.2% of the population, they spend 29% of the total nationwide expenditure for personal health care. In 1979, $40.6 billion, or 19% of total national health care expenditure went directly for doctors' bills, approximately $180 per person. Persons over the age 65 visit a physician an average of 6.3 times per year compared with the average of 4.8 times for individuals generally. The elderly require physicians' services not only more frequently, but for more complicated and therefore more expensive treatment than the average individual. Compounding the rate of increase in doctors' fees is the increase in out-of-pocket costs to older Americans for services rendered by these doctors. Only 46% of physicians accept Part B medicare reimbursement as payment in full for their services. Older Americans must assume substantial costs in the form of Medicare deductibles, coinsurance and fees in excess of the Medicare "reasonable-charge" reimbursements for doctors' services. For Americans over the age of 65, a full 41.8% of physicians' services are paid for privately. Gibson, *National Health Expenditures 1979*, 2 HEALTH CARE FINANCING REVIEW 1 (Summer 1980); Fisher, *Differences By Age Groups in Health Care Spending*, 1 HEALTH CARE FINANCING REVIEW 4 (Spring 1980).

The overriding interest of AARP and NRTA in the health care field is to foster and promote efficient delivery to the elderly of the best possible services at the least possible cost, thus making them readily available even for persons living within fixed and limited incomes. AARP and NRTA have advanced and supported introduction of strong cost containment measures which foster competition in the health care industry, because *amici* steadfastly maintain that elimination of all anti-competitive barriers is essential if the ultimate goal is to be achieved. To this end, *amici* have consistently argued before federal and state legislatures and administrative agencies that the health and medical professions should not be exempt from the antitrust laws and that all existing state or federal antitrust exemptions in the health care field should be abolished.[2]

Instead of reducing the scope of such exemptions, the decision of the Ninth Circuit herein has created what amounts to a *new* exemption for physicians from Section 1 of the Sherman Act. It seeks to justify creation of this new exemption for physicians simply because there already exist anti-competitive characteristics in the health care industry! This is paradoxical at best and dangerous at worst. The absence from the health care field of "ideal

2. The Health Policy chapter of the AARP-NRTA 1981 Federal and State Legislative Program was introduced into the Congressional Record by Senator David H. Pryor (D-Ar.), on April 7, 1981, 127 CONG. REC. S3565; in addition *amici* have testified and submitted statements to the House Budget Committee on March 13, 1981 and to the Senate Finance Committee on March 26, 1981 in respect of the administration's proposed budget reductions in health and social services; to the FTC on April 30, 1980 in respect of "Medical Participation in Control of Certain Open-Panel Medical Prepayment Plans"; to the Senate Finance Committee on April 11, 1980 in respect of "Health Care and the Elderly in the Present Economic Climate"; to the Health Subcommittee of the Senate Finance Committee on March 18, 1980 in respect of The Health Incentive Reform Act of 1980 (S.1968); and to the Health Subcommittee of the House Interstate and Foreign Commerce Committee on February 14, 1978 in respect of the Health Planning and Resources Development Amendments of 1978 (H.R. 10460).

competitive conditions"[3] bears no logical relation to the Ninth Circuit's conclusion that physicians' price arrangements in Maricopa and Pima counties are not *per se* contracts or combinations in "restraint of trade."[4]

Fixed and uniform fee-for-service schedules, such as those adopted by the physicians in Maricopa and Pima Counties, are in diametric opposition to the strong cost containment measures, such as negotiated fee schedules and prospective reimbursement, that *amici* have advanced in their endeavor to promote competition in the health care field. These measures involve pre-encounter budgeting for patient care and hold the physician accountable for expenditures in excess of the budget, thereby giving health care consumers, more often than not older people, some control over the cost of treatment.

The consequence of the Ninth Circuit's decision will be to enable physician groups, moreso than ever, to control with impunity third-party payor plans.[5] The result of such judicially condoned unfair and anti-competitive trade practices can only be inevitably to reduce and eliminate competition and to aid physicians in achieving target level incomes at the expense of consumers of health care services who are, disproportionately, older Americans.

ARGUMENT

Amici respectfully join in the legal argument advanced by the Petitioner and by the *amici curiae* in support of the Petitioner, including the United States. We respectfully highlight below several points of direct concern to AARP and NRTA.

---

3. *See* Appendix A to the Petition, p 6.
4. *See* § 1 of the Sherman Act, 15 U.S.C. § 1.
5. Horizontal price fixing such as that engaged in by the Maricopa and Pima County Foundations translates directly into increased Medicare program costs under the "reasonable charge" reimbursement standard set by Congress. *See* 42 U.S.C. §§1395u, 1395x(v)(l)(A).

I.

THE NINTH CIRCUIT'S CREATION OF A SPECIAL ANTITRUST EXEMPTION FOR HORIZONTAL PRICE FIXING AMONG PHYSICIANS THREATENS TO DESTROY ANY CHANCE FOR HEALTH CARE COST CONTAINMENT.

The Ninth Circuit upheld an exemption for physicians from established antitrust standards of enforcement, because it was "confronted with an industry widely deviant from a reasonably free competitive model."[6]

In other words, says the Ninth Circuit, because no competition exists now, it is acceptable to permit admittedly anti-competitive practices to continue unchecked. But it is these very anti-competitive practices which Congress sought to stamp out via the Sherman Act. The fact that the health care field may be markedly anti-competitive cannot be used as a crutch to condone and encourage the carving out of an undesirable exemption from the Sherman Act. The Ninth Circuit opinion threatens to eliminate in one fell swoop all recent Congressional action designed to foster competition, which *amici* have vigorously supported.[7]

Congress, recognizing the anti-competitive features of the health care field, has denominated the strengthening of competition as a national health priority[8] and has established incentives specifically aimed at fostering competition in the health care marketplace. *Amici* have worked hard to promote implementation of these and other responses to the anti-competitive nature of the health care field.

Judge Sneed's opinion below endows the medical profession with a protected status and creates a dangerous precedent in defense of price fixing by ruling that it is the *reasonableness* of the fixed prices that is determinative, as opposed to the *act* of fixing those prices by contract or

6. *See* Appendix A to the Petition, p. 6.
7. *See, e.g.*, 42 U.S.C. § 300k-2(a)(17); *See also* Footnote 2, *supra*.
8. 42 U.S.C. § 300k-2(a)(17).

agreement, even though that act might otherwise be in direct contravention of § 1 of the Sherman Act. This new "rule of reason" would seem to require that with each change in price, the burden falls on the consuming public to institute suit and seek a court determination on the "reasonableness" of the newly established price list. The opinion ignores the fact recognized by Congress and this Court that today's so-called fixed but "reasonable" price will undoubtedly be tomorrow's fixed and unreasonable price.[9]

Furthermore, where it is possible to create a competitive environment, as clearly seems feasible in the health care field, it should not be for doctors or courts to substitute their judgment as to the reasonableness of prices for the normal forces of the market. It is, therefore, not in the public interest that a judicial exemption for the medical profession be permitted to stand or that doctors be permitted to fix prices.

II.

OLDER AMERICANS ARE ENTITLED TO PURCHASE AND NEGOTIATE FOR DOCTORS' SERVICES IN AN OPEN, COMPETITIVE MARKETPLACE.

The Sherman Act is a clear enunciation of the consumer's right to negotiate for all goods and services, including physicians' services, at arms-length, in an open, competitive marketplace. This right has been reaffirmed in recent legislation.[10]

The Ninth Circuit's opinion, condoning physicians' price fixing because the prices may be "reasonable", bypasses the relevant statutory inquiry, i.e. has there been price fixing?[11] If there has been price fixing, by definition, competition has

9. *See* Footnote 8 *supra: See also National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 689 (1978); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 212-224 (1940); *United States* v. *Trenton Potteries Co.,* 273 U.S. 392,397 (1927); *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 340-341 (1897).

10. *See, e.g.* 42 U.S.C. § 300k-2(a)(17).

11. *See* Appendix A to the Petition, pp. 6-7, 31.

indeed been restrained, and the consumers of health care, a disproportionate number of whom are older Americans, have thereby been deprived of the competitive market conditions which are desireable to bring them the best health care at the lowest cost.

If the Ninth Circuit's decision is affirmed, it will constitute judicial sanction of the absence of competition in delivery of health care services and will act as a brake on the efforts of *amici* and others to expand such competition in order to improve the availability and quality of health care for the elderly.

CONCLUSION

Price fixing arrangements among physicians, which can result only in higher health care costs for vulnerable older Americans, and indeed for all consumers of medical services, should not be afforded judicial sanction.

WHEREFORE, the decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

MILLER, SINGER, MICHAELSON & RAIVES
555 Madison Avenue
New York, New York 10022
(212) 752-8830
Attorneys for Amici Curiae

ALFRED MILLER,
Counsel of Record.

PETER N. GREENWALD
STEVEN ZALEZNICK,
Of Counsel.

Dated: June 5, 1981
New York, New York

EXHIBIT A

CONSENT OF PETITIONERS TO FILING OF BRIEF
AMICI CURIAE

LETTERHEAD OF ARIZONA ATTORNEY GENERAL

June 3, 1981

Peter N. Greenwald, Esq.
Miller, Singer, Michaelson
& Raives
555 Madison Avenue
New York, NY 10022

Re: *State of Arizona* v. *Maricopa County Medical Society, et al.*

Dear Mr. Greenwald:

The State of Arizona hereby consents to your filing an *amicus* brief on behalf of your clients, the American Association of Retired Persons and the National Retired Teachers Association, in the above referenced case.

Very truly yours,

/s/ CHARLES L. EGER
Charles L. Eger
Assistant Attorney General
Antitrust Division

EXHIBIT B

CONSENT OF RESPONDENTS TO FILING OF BRIEF *AMICI CURIAE*

LETTERHEAD OF BROWN & BAIN

May 15, 1981

State of Arizona v.
Maricopa County Medical Society

Dear Mr. Greenwald:

Confirming our telephone conversion of May 14, I am authorized on behalf of respondents to state that they do not object to your filing an *amicus* brief in the above-captioned matter on behalf of your clients, the American Association of Retired Persons and the National Retired Teachers Association.

Very truly yours,

/s/ PHILIP P. BERELSON
Philip P. Berelson

Peter Greenwald, Esq.
Miller, Singer, Michaelson & Raives
555 Madison Avenue
New York, New York 10022

PPB:lth

Copies to:

Daniel J. McAuliffe, Esq.
Snell and Wilmer
3100 Valley Bank Center
Phoenix, Arizona 85073

Kenneth R. Reed, Esq.
Suite 760
114 West Adams
Phoenix, Arizona 85003

Robert O. Lesher, Esq.
Lesher, Kimble & Rucker, P.C.
3773 East Broadway
Tucson, Arizona 85716

Charles Eger, Esq.
Assistant Attorney General
Antitrust Division
114 West Adams, Sixth Floor
Phoenix, Arizona 85003